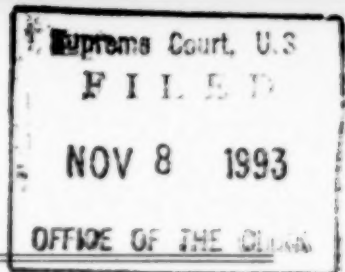


No. 93-180



In The
Supreme Court of the United States

October Term, 1993

BOCA GRANDE CLUB, INC.,

Petitioner,

vs.

FLORIDA POWER & LIGHT COMPANY, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

AMICUS CURIAE BRIEF OF NATIONAL
ASSOCIATION OF SECURITIES AND COMMERCIAL
LAW ATTORNEYS ("NASCAT"), IN SUPPORT
OF NEITHER PARTY, URGING REVERSAL

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QUESTION PRESENTED

Whether a settlement between a joint tortfeasor and plaintiff may bar nonsettling defendants' later claims for contribution against the settling tortfeasor.

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LAW ATTORNEYS ("NASCAT"), IN SUPPORT
OF NEITHER PARTY, URGING REVERSAL

I. INTEREST OF AMICUS CURIAE

NASCAT is an association of law firms and attorneys located throughout the United States. NASCAT advocates principled interpretations of law to facilitate the effective prosecution and settlement of securities fraud class actions and other complex commercial litigation. NASCAT's members frequently represent plaintiffs in such actions.

NASCAT and its members have an interest in this case because this Court's decision may affect the rules governing settlement of claims against joint tortfeasors. Although the parties before the Court frame the issues in terms of the rules that apply to settlements under maritime law or in admiralty, the underlying principles of joint liability and contribution are not necessarily limited to the field of admiralty. Joint liability applies generally whenever common law or statutory claims are based on the wrongdoing of more than one person, and claims for contribution are recognized in an ever-increasing variety of cases – from common law actions for negligence to federal statutory claims.

Of particular importance to NASCAT and its members is the fact that contribution is available to joint wrongdoers under the federal securities laws.¹ Recognition of contribution under the securities laws has a profound impact on the prosecution and settlement of securities fraud cases. Depending on how the interest in contribution is interpreted and applied by the courts, settlement of claims and compensation of victims of fraud may be facilitated or frustrated.

¹ The Securities Act of 1933 (the "Securities Act") provides for contribution among those jointly liable for violations of §11 of that Act, *see* 15 U.S.C. §77k(f), and Sections 9 and 18 of the Securities Exchange Act of 1934 (the "Exchange Act") also provide for contribution among defendants who violate their provisions. *See* 15 U.S.C. §§78i, 78r. This Court recently recognized an implied right to contribution to benefit defendants who violate Section 10(b) of the Exchange Act, 15 U.S.C. §78j(b). *See Musick, Peeler & Garrett v. Employers Insurance of Wausau*, ___ U.S. ___ 113 S. Ct. 2085, 2091-92 (1993).

II. SUMMARY OF ARGUMENT

This Court granted certiorari to consider a single issue: Whether "settlement between a joint tortfeasor and a plaintiff bars all claims for contribution by nonsettling tortfeasors against the settling tortfeasor." *See* Petition for Certiorari at i; *Boca Grande Club, Inc. v. Florida Power & Light Co.*, ___ U.S. ___, 125 L.Ed.2d 788, 62 U.S.L.W. 3241 (Sept. 28, 1993) (granting certiorari).

The Petitioner correctly urges the Court to hold that a partial settlement of claims may bar actions for contribution by defendants who did not settle and are ultimately found to be liable. *See infra* §III.A. Contribution is based on equitable principles, and should be shaped to further the public policy goals of compensating tort victims and of simplifying litigation. *See infra* §III.A.1. If claims for contribution can be barred, a joint defendant has an incentive to compensate its victim with a partial settlement because by doing so it can avoid the risks and expense of litigating the case through trial. However, a defendant gains little or nothing by settling a plaintiff's claims against it if the defendant remains liable to its codefendants for contribution based on the very claims that were settled. The equitable doctrine permitting actions for contribution among joint tortfeasors should not be allowed to defeat the superior equitable interest of their victims in obtaining compensation through such settlements. *See infra* §III.A.2-4.

The parties may ask this Court to decide – or assume the answer to – a second question: The effect a settlement and contribution bar will have on a plaintiff's claims against defendants who do not settle. The Court should not reach this second issue which is not encompassed in

the grant of certiorari. *See infra* §III.B. The real dispute on this point is not between the Petitioner and the Respondent. It is between the Respondent and the victims of the parties' joint tort, who are not represented before this Court. The issues involved are important and complicated. This Court need not and should not reach the question of the precise effect a settlement has on the claims of a settling plaintiff. The decision of this issue could have far reaching consequences; it should be reserved for a case where it is squarely presented and can be thoroughly briefed. *See infra* §III.B.1.

This Court should *not*, in any event, endorse the parties' assumption that their victims' right to be made whole may be prejudiced by requiring a "proportionate fault" reduction of the nonsettling defendant's liability to the plaintiffs in this case. The proportionate fault rule that the parties approve of deprives tort victims of the right to be made whole, imposing a severe penalty on plaintiffs who settle with some but not all of the defendants in the case. The proportionate fault rule discourages settlement and greatly complicates litigation of complex cases. Contribution is an equitable doctrine that can facilitate the settlement of claims, permitting a joint tortfeasor who compensates the victim to spread the cost of that payment to its joint tortfeasors who otherwise would be unjustly enriched by avoiding their liability to the plaintiff; it cannot reasonably be interpreted to shift the cost of a settlement to the victim of a tort. In *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 272 n.30 (1979), this Court observed that while a joint tortfeasor's equitable interest in obtaining contribution from other joint tortfeasors "may sometimes limit the

ultimate loss" suffered by a tortfeasor, "it does not justify allocating more of the loss to the innocent [victim of their tort], who was not unjustly enriched." *Id.* *See infra* §III.B.2.

III. ARGUMENT

A. A Settling Defendant Should Be Able To Bar Its Joint Tortfeasors' Claims For Contribution

The fact that courts, in the exercise of their equitable powers, properly permit actions for contribution in order to encourage settlement of claims, and to prevent unjust enrichment of tortfeasors who refuse to settle or pay, provides no legitimate ground for holding that defendants who do settle claims against them must remain exposed to the very liability they sought to avoid by entering a settlement.

1. Joint Tortfeasors' Equitable Interest In Contribution Should Not Be Construed Or Applied To Defeat The Equitable Interest Of Their Victims In Compensation Through Partial Settlement Of Claims

Respondent's claimed "right" to contribution is in reality an equitable interest, recognized by courts in the exercise of their equitable discretion.² The victim of a tort

² "Traditionally, equity has been the hallmark of contribution. The doctrine originated in courts of equity, and its rationale has not been altered by adoption in the common law." *Gould v. American-Hawaiian Steamship Co.*, 387 F. Supp. 163, 170

has a superior interest in obtaining compensation without unnecessary delay and expense. Courts should *not* transform the equitable interest in contribution among joint wrongdoers into a legal right that tramples the equitable interests of their victims by making partial settlements virtually impossible.

The common law initially rejected contribution among joint tortfeasors on the ground that courts should not intervene among wrongdoers.³ When courts recognized contribution among joint tortfeasors they did so pursuant to principles of equity in order to favor the tortfeasor who discharged a common liability by paying more than its proportionate share of damages, and to prevent the unjust enrichment of joint tortfeasors who refused to compensate victims of their joint wrongdoing. See *George's Radio, Inc. v. Capital Transit Co.*, 126 F.2d 219, 220-21 (D.C. Cir. 1942). "Such contribution, however, must arise from the duty each of the wrongdoers owes to the injured party and not from any obligation among themselves." *Fischbach & Moore International Corp. v. Crane Barge R-14*, 632 F.2d 1123, 1125 (4th Cir. 1980).

(D. Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976); accord *Dawson v. Contractors Transp. Corp.*, 467 F.2d 727, 731-32 (D.C. Cir. 1972); *Jones v. Schramm*, 436 F.2d 899, 901 (D.C. Cir. 1970).

³ See *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 634 (1981); *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 86-88 & n.16 (1981); *Union Stock Yards Co. v. Chicago B. & Q.R. Co.*, 196 U.S. 217, 224 & 228 (1905); *Merryweather v. Nixan*, 8 Term Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799).

If the interest in contribution is equitable in character, and arises from the duty each of the wrongdoers owes to the injured party, then it ought to be interpreted and applied in a fashion that takes account of the interests of the joint tortfeasors' victim. The party whose interests have the greatest equitable weight in shaping the right of contribution among joint wrongdoers is the victim of their wrongdoing. See *Edmonds*, 443 U.S. at 272 n.30. Sensibly applied, contribution among wrongdoers may actually benefit the injured party – for partial settlements are encouraged if a defendant who compensates the victim of a joint tort obtains a cause of action for contribution against the other joint tortfeasors.⁴

⁴ The settling defendant's access to contribution creates an incentive encouraging settlement, because a defendant who knows a joint tort was committed is free to pay the victim and to pursue contribution against its joint wrongdoers. Congress recognized that availability of contribution can encourage settlement when it provided for contribution under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§9601-9675. When amendments providing for contribution under CERCLA were offered, the Chairman of the Senate Judiciary Committee explained their purpose: "All of the expert witnesses before the Committee agree that the right to contribution should be codified in order to encourage responsible parties to engage in cleanup and settlement." 131 Cong. Rec. S. 11,857 (daily ed. Sept. 20, 1985) (emphasis added) (quoted in *United States v. New Castle County*, 642 F. Supp. 1258, 1268 n.10 (D. Del. 1986)). In shaping CERCLA Congress provided that a person "who has resolved its liability to the United States . . . for some or all of a response action . . . in an administrative or judicially approved settlement may seek contribution from any person who is not a party to a settlement." 42 U.S.C. §9613(f)(3)(B). Congress further provided that a defendant who settles the claims against it "shall not be liable for

The availability of partial settlements increases the likelihood that the injured party will receive speedy compensation for the wrongs he or she has suffered. Whenever courts are faced with choices in shaping the right to contribution among joint wrongdoers, their first consideration must be whether the rules to be chosen will have an impact on the victim of joint wrongdoing. Rules that operate to the disadvantage of the victim of joint wrongdoing ought to be rejected, and rules that operate to the advantage of the victim of the joint wrongdoing ought to be favored. Considerations of equity among wrongdoers ought never be allowed to control over the overriding interest of doing equity to their joint victim: " 'Promoting full recovery and encouraging partial settlement take

claims for contribution regarding matters addressed in the settlement." 42 U.S.C. §9613(f)(2). Congress thus encouraged settlement while preserving the right to full recovery by providing that "[s]uch settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement." *Id.*; see also 42 U.S.C. §9622(g)(5). These provisions were designed "to codify the right [to contribution] and, retaining current law would allow a judge the discretion and flexibility to manage the contribution issues in a law suit." 131 Cong. Rec. S. 11,857 (emphasis added) (quoted in *New Castle County*, 642 F.Supp. at 1268 n.10).

The Eleventh Circuit's holding in *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575, 1584-85 (11th Cir.), cert. denied, 113 S. Ct. 484 (1992), that a settling defendant retains the right to pursue claims for contribution against joint tortfeasors who did not settle is eminently sensible. Its holding that claims for contribution against a settling defendant cannot be barred is not sensible. See *infra* §III.A.2.

precedence over the . . . policy of enforcing an equitable apportionment of a loss among responsible defendants.' "⁵

2. Without Contribution Bars Partial Settlements Are Virtually Impossible

Settlement of claims can be encouraged only if a defendant who settles with the plaintiff thereby avoids further liability. Settlement makes sense precisely because it defines and limits the scope of a party's liability. If a joint tortfeasor who settles a victim's claim against it still faces claims for contribution based upon the very same liability, he or she gains nothing by settling. See *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 160 (4th Cir. 1991); *Nelson v. Bennett*, 662 F. Supp. 1324, 1328-29, 1334-35 (E.D. Cal. 1987). Thus, virtually every court to consider the question has held that a joint tortfeasor's settlement of claims may properly act as a bar to its subsequent liability for contribution.⁶ The Eleventh Circuit stands alone by holding

⁵ *FDIC v. Geldermann, Inc.*, 763 F. Supp. 524, 529 (W.D. Okla. 1990) (quoting Thomas V. Harris, *Washington's Unique Approach to Partial Tort Settlements: The Modified Pro Tanto Credit and Reasonableness Hearing Requirement*, 20 Gonz. L. Rev. 69, 167 (1985)), rev'd on other grounds, 975 F.2d 695 (10th Cir. 1992).

⁶ See, e.g., *Rufolo v. Midwest Marine Contractor, Inc.*, No. 92-1593, ___ F.2d ___, 1993 U.S. App. LEXIS 25013, at *11-*14 (7th Cir. Sept. 29, 1993); *Jiffy Lube*, 927 F.2d at 160; *FDIC v. Geldermann, Inc.*, 975 F.2d 695, 698 (10th Cir. 1992); *In re Masters Mates & Pilots Pension Plan and IRAP Litigation*, 957 F.2d 1020, 1031-32 (2d Cir. 1992); *In re Ivan F. Boesky Sec. Litig.*, 948 F.2d 1358, 1362-63 (2d Cir. 1991); *Miller v. Christopher*, 887 F.2d 902, 906-07 (9th Cir. 1989); *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1229 (9th Cir. 1989), cert. denied, 498 U.S. 890 (1990); *McDonald v. Union*

otherwise in *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575 (11th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 484 (1992) and *Boca Grande Club, Inc. v. Polackwich*, 990 F.2d 607 (11th Cir.), *cert. granted*, ___ U.S. ___, 62 U.S.L.W. 3241 (Sept. 28, 1993).

The Eleventh Circuit's assertion in *Great Lakes Dredge & Dock* that "rejecting the settlement bar rule has a slight disincentive effect upon settlements" is ridiculous. 957 F.2d at 1582. This "slight" disincentive would eliminate partial settlements. *See In re Nucorp Energy Sec. Litig.*, 661 F. Supp. 1403, 1408 (S.D. Cal. 1987); *Nelson*, 662 F. Supp. at 1334. "[N]o defendant would settle with [the plaintiff] if he was to find himself back in the suit as a third party defendant." *Sabre Shipping Corp. v. American President Lines, Ltd.*, 298 F. Supp. 1339, 1346 (S.D.N.Y. 1969). If there is no bar to contribution "then partial settlement of any federal securities case before trial is, as a practical matter, impossible." *Nucorp*, 661 F. Supp. at 1408. As the Ninth Circuit explained in *Franklin v. Kaypro Corp.*:

"Any single defendant who refuses to settle, for whatever reason, forces all others to trial. Any-one foolish enough to settle without barring

Carbide Corp., 734 F.2d 182, 184 (5th Cir. 1984); *Nelson*, 662 F. Supp. at 1334-35; *In re Nucorp Energy Sec. Litig.*, 661 F. Supp. 1403, 1408 (S.D. Cal. 1987); *TBG, Inc. v. Bendis*, 811 F. Supp. 596, 602 (D. Kan. 1992), *motion for reconsideration denied*, 813 F. Supp. 766 (D. Kan. 1993); *In re Washington Public Power Supply System Sec. Litig.*, 720 F. Supp. 1379, 1399-1401 (D. Ariz. 1989); *In re Washington Public Power Supply System Sec. Litig.*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶94,326, at 92,144-45 (W.D. Wash. 1988); *Kirkorian v. Borelli*, 695 F. Supp. 446, 452-54 (N.D. Cal. 1988).

contribution is courting disaster. They are allowing the total damages from which their ultimate share will be derived to be determined in a trial where they are not even represented."

Franklin v. Kaypro Corp., 884 F.2d 1222, 1229 (9th Cir. 1989), *cert. denied*, 498 U.S. 890 (1990) (quoting *Nucorp*, 661 F. Supp. at 1408); *accord TBG, Inc. v. Bendis*, 811 F. Supp. 596, 602 (D. Kan. 1992), *motion for reconsideration denied*, 813 F.Supp. 766 (D. Kan. 1993).

Even the Eleventh Circuit cannot abide the consequences of a general holding that claims for contribution may not be barred. In *In re U.S. Oil & Gas Litig.*, 967 F.2d 489 (11th Cir. 1992), it limits *Great Lakes Dredge & Dock's* holding to maritime cases, *id.* at 494 n.3, recognizing "that bar orders play an integral role in facilitating settlement." *Id.* at 494. "Defendants buy little peace through settlement unless they are assured that they will be protected against codefendants' efforts to shift their losses through cross-claims for indemnity, contribution, and other causes related to the underlying litigation." *Id.*

Equitable considerations favor prompt compensation of tort victims and public policy favors simplification and settlement of litigation. With partial settlements, tort victims "who otherwise might have to wait many years are assured some immediate compensation; the settling defendants are able to free themselves from litigation and pursue more productive matters; and the scarce societal resources which might be consumed by increasingly expensive litigation can be put to other redeeming uses." *Nelson*, 662 F. Supp. at 1334-35. Justice Powell has aptly observed that "parties to litigation and the public as a whole have an interest - often an overriding one - in

settlement rather than exhaustion of protracted court proceedings."⁷ Bars to contribution should be permitted in connection with the partial settlement of claims against joint tortfeasors.

3. The Interest Of Nonsettling Defendants May Be Protected By A Good Faith Hearing And Findings That A Settlement Is Reasonable

If nonsettling defendants are forced to pay plaintiffs anything it will be because a factfinder concludes they committed a tort and are jointly liable for the entire damage caused. Their own wrongful conduct is an unseemly basis for invoking a court's equitable jurisdiction, asking it to prevent partial compensation of their victims. The interest of nonsettling defendants – in ensuring against "collusive" settlements on unfair and unreasonable terms – can be adequately protected when claims for contribution are barred in connection with a partial settlement. Simple economic self interest should ensure that plaintiffs will seldom settle for an unreasonably low payment from a substantially culpable defendant. However, where it appears that a settlement may be collusive and unfair, a court can always require a good faith hearing where the likelihood of recovery, the settling defendant's ability to pay, and the roles of the several defendants in causing the harm suffered may be considered to ensure that the settlement is reasonable. *See, e.g., Miller v.*

⁷ *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 363 (1981) (Powell, J., concurring); *see also Marek v. Chesney*, 473 U.S. 1, 5 (1985); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1289 (9th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 408 (1992); *Nelson*, 662 F. Supp. at 1334-35.

Christopher, 887 F.2d 902, 907-08 (9th Cir. 1989); *TBG*, 811 F. Supp. at 604; *Tech-Bilt, Inc. v. Woodward-Clyde & Assoc.*, 38 Cal. 3d 488, 499, 213 Cal. Rptr. 256, 263 (1985).

The notion that allowing a bar to contribution would encourage "collusive" settlements is misplaced. Exactly what constitutes "collusion" under such circumstances is not at all clear. However, the economic self-interest of plaintiffs should be enough to ensure that they seldom will settle for unreasonably small amounts. They are particularly unlikely to let the most culpable defendants out of a case for an unreasonably small payment, for the absence of such defendants decreases the likelihood of a favorable jury verdict and reduces the expectation that remaining defendants will be held jointly and severally liable for the wrongs committed.

The one situation in which plaintiffs are likely to settle with culpable defendants for an amount that is truly disproportionate with those defendants' relative fault arises when the settling defendants lack substantial insurance coverage or are close to insolvency. It certainly makes sense for a plaintiff to settle with a defendant for a small amount if that defendant lacks the assets to pay a substantial judgment. Under such circumstances the nonsettling defendants' interest in contribution itself likely amounts to little. The defendant who lacks the resources to pay a substantial judgment to the plaintiff also lacks the resources to pay a substantial amount in contribution.

4. This Court's Precedents Do Not Prohibit Bars To Contribution In Connection With Partial Settlements

This Court's holdings in *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), and *Cooper Stevedoring Co. v. Fritz*

Kopke, Inc., 417 U.S. 106 (1974), do not prohibit contribution bar orders. *Cooper Stevedoring* recognizes an interest in contribution in admiralty, but it does not address whether contribution claims may be barred by a good faith settlement. *Reliable Transfer* also does not address the issue; rather, it holds that where two vessels collide, and both are at fault, principles of comparative negligence apply to adjudicate claims between them. It *does not* hold that principles of comparative negligence between defendants can control over the right of a victim of their joint tort to obtain compensation through partial settlements.

No precedent at this Court justifies a rule prohibiting bars to claims for contribution in connection with the partial settlement of a claim. The rule created in *Great Lakes Dredge & Dock* and applied by the Eleventh Circuit in this case is grossly inequitable to the victims of joint torts because it makes it virtually impossible for them to enter partial settlements of their claims when some but not all joint tortfeasors are willing to settle on favorable terms. This Court ought to reject the Eleventh Circuit's new rule, for the interest of allocational equity among wrongdoers is insufficient to overcome the equitable interest of assuring prompt compensation to their victim.

B. This Court Need Not And Should Not Reach The Question Of What Impact A Settlement Should Have On Plaintiffs' Claims

Once it is determined that settlement of claims may bar a settling defendant's liability for contribution, the question remains as to what effect the settlement and bar should have on the plaintiffs' claims against remaining defendants. Because a plaintiff who settles with one of

several defendants receives partial compensation for the loss suffered, it makes sense to reduce the liability of the remaining defendants accordingly. However there are a variety of approaches to determining how the reduction should be calculated. Plaintiffs might be subject to a "*pro tanto*" setoff, a "*pro rata*" setoff or a "proportionate fault" setoff against the plaintiffs' claims. *See infra* at 17-21. This Court should not reach the question because it is neither encompassed in the issue presented by the Petition for Certiorari nor necessary to its resolution. *See* Petition for Certiorari at i; *Boca Grande Club*, ___ U.S. ___, 62 U.S.L.W. 3241.

The Petition for Certiorari and Respondent's Opposition identify only one of several contribution bar rules, and the rule they agree on is extraordinarily unfavorable to the victims of joint torts.⁸ Both parties before this Court agree that claims for contribution may be barred if this Court limits the claims of their joint victims, cutting off the victims' right to be made whole even though they are not represented before this Court.⁹ This Court should

⁸ The Petition for Certiorari and Respondent's Opposition to it both suggest that if contribution is barred the nonsettling defendants may be entitled to a "*pro rata*" offset of liability. *See infra* note 9. What they call a "*pro rata*" reduction is really a proportionate fault reduction, a different contribution bar rule altogether. *See infra* at 17-21. In fact, the majority of the courts to address the question have adopted a third rule, holding that where contribution claims are barred by settlement the remaining defendants are entitled to a *pro tanto* set off of the amount of the settlement. *See infra* note 16.

⁹ In its Petition for Certiorari, Boca Grande Club argued that this Court should adopt either (1) a rule barring contribution claims without regard to the effect on a plaintiffs' claims against nonsettling defendants, or (2) a rule that "eliminates contribution by reducing the plaintiff's claim by the *pro rata*

not adopt or endorse such a contribution bar rule in a case where the plaintiffs, whose claims will be harmed, are not represented before this Court.¹⁰

This Court's choice of a rule in this case would, in effect, adjudicate rights arising between the Respondents as nonsettling defendants, and the tort-victim plaintiffs in the underlying action *who are not even represented before this Court*. This Court's choice of a specific contribution bar rule would, moreover, have far reaching consequences beyond this case – and perhaps beyond the law of admiralty as well. The issue should be reserved for a case where it is squarely presented, and where the plaintiffs whose rights are affected are parties before this Court.

[sic] portion of the liability of the settling defendant." Petition for Certiorari at 5. In Respondent's Brief in Opposition to the Petition for Certiorari, Florida Power and Light took the position that where a joint tortfeasor settles the law should either (1) allow an action for contribution against the settling tortfeasor by any other tortfeasor who has paid more than his or her equitable share of the plaintiff's claim, or (2) "[r]educ[e] the claim of the plaintiff by the pro rata [sic] share of a settling tortfeasor's liability for damages." Respondent's Brief in Opposition at 5-6.

¹⁰ The fact the parties before this Court agree that a contribution bar is appropriate, provided the claims of a party not before this Court are reduced, may even raise a question as to whether this Court's jurisdiction has been properly invoked. The fact that the parties before the Court agree on the resolution of this appeal may demonstrate "the absence of a genuine adversary issue between the parties." *United States v. Johnson*, 319 U.S. 302, 304 (1943). "[I]f one party agrees with the position taken by the other, there is no case or controversy within the meaning of Article III." Laurence H. Tribe, *American Constitutional Law* §3-12 at 93 (2d ed. 1988).

Considerable confusion surrounds even the terms used to describe alternative setoff rules – both in this litigation and elsewhere. While both the Respondent and Petitioner advocate a "*pro rata*" reduction of their victims' ultimate recovery, the reduction they actually describe is one based on proportional fault.¹¹ There are three basic approaches to this reduction of liability: (1) *pro tanto* reduction, (2) *pro rata* reduction, and (3) proportional reduction based on relative culpability.¹²

Under the *pro tanto* approach, any judgment against the remaining defendants will be reduced by the amount of the settlement itself. See *Jiffy Lube*, 927 F.2d at 160-61 & n.3; *TBG, Inc. v. Bendis*, 811 F. Supp. 596, 602-03 (D. Kan. 1992) *motion for reconsideration denied*, 815 F. Supp. 766 (D. Kan. 1993); *FDIC v. Geldermann, Inc.*, 763 F. Supp. 524, 527-28 (W.D. Okla. 1990), *rev'd on other grounds*, 975 F.2d 695 (10th Cir. 1992). The *pro tanto* rule applies in many states,¹³ as well as under the Uniform Contribution

¹¹ See *supra* note 9. Their confusion of terms probably stems from the Eleventh Circuit's misuse of the "*pro rata*" label to describe what is, in substance, a proportional fault reduction of liability in *Great Lakes Dredge & Dock*. See 957 F.2d at 1579.

¹² See *Jiffy Lube*, 927 F.2d at 161 n.3; *Geldermann*, 763 F. Supp. at 527-28; *In re Terra-Drill Partnerships Sec. Litig.*, 726 F. Supp. 655, 656-57 (S.D. Tex. 1989); see generally Harris, *supra* note 5, at 77-112. Seventh Circuit precedents refer to the *pro tanto* methodology as the "contribution plus settlement bar" approach, and refer to the proportionate fault methodology as the "claim reduction" approach. See *In re Oil Spill By the Amoco Cadiz*, 954 F.2d 1279, 1280-81 (7th Cir. 1992)..

¹³ See, e.g., *Tech-Bilt, Inc. v. Woodward-Clyde & Assoc.*, 38 Cal. 3d 488, 492-93, 213 Cal. Rptr. 256 (1985); *Process Masters, Inc. v. Alpha III Ltd. Partnership*, 477 So. 2d 69, 69-70 (Fla. App. 1985);

Among Tortfeasors Act.¹⁴ Congress adopted it to govern contribution bars for statutory liabilities under CERCLA,¹⁵ and most federal precedents hold that where contribution claims are barred by settlement, the remaining defendants are entitled to a *pro tanto* setoff in the amount of the settlement.¹⁶

Bishop v. Klein, 380 Mass. 285, 294-95, 402 N.E.2d 1365, 1371 (1980); *Yost v. State*, 640 P.2d 1044, 1048 (Utah 1980); Cal. Civ. Proc. Code §§877, 877.6; Fla. Stat. Ann. §§768.041, 768.31(5); Ill. Rev. Stat. ch. 70 ¶302; Mass. Gen. L. ch. 231B §4; Wash. Rev. Code §4.22.060.

¹⁴ Uniform Contribution Among Tortfeasors Act §4(a), 12 U.L.A. 57, at 98 (1975).

¹⁵ In CERCLA, Congress provided that a defendant who enters a settlement with the United States or a State shall be immune to claims for contribution, and also provided that one defendant's settlement "reduces the potential liability of the others by the amount of the settlement." 42 U.S.C. §9613(f)(2) (emphasis added). "The law's plain language admits of no construction other than a dollar-for-dollar reduction of the aggregate liability." *United States v. Cannons Engineering Corp.*, 899 F.2d 79, 92 (1st Cir. 1990); see *City and County of Denver v. Adolph Coors Co.*, 829 F. Supp. 340, 345-46 (D. Colo. 1993); *City of New York v. Exxon Corp.*, 697 F. Supp. 677, 681 n.5 (S.D.N.Y. 1988).

¹⁶ See, e.g., *Rufolo*, ___ F.2d ___, 1993 U.S. App. LEXIS 25103, at *10-*14; *Rollins v. Cenac Towing Co.*, 938 F.2d 599, 600-01 (5th Cir. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 1242 (1992); *Singer*, 878 F.2d 596, 600 (2d Cir. 1989), cert. denied, 493 U.S. 1024 (1990); *Hess Oil Virgin Islands Corp. v. UOP, Inc.*, 861 F.2d 1197, 1209 (10th Cir. 1988); *Hernandez v. M/V Rajaan*, 841 F.2d 582, 591 (5th Cir.), corrected on petition for rehearing, 848 F.2d 498 (5th Cir.), cert. denied, 488 U.S. 981 (1988); *Miller v. Apartments & Homes of New Jersey, Inc.*, 646 F.2d 101, 109 (3d Cir. 1981); *TBG*, 811 F. Supp. at 602-05; *Biben v. Card*, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,512, at 92,332-33 (W.D. Mo. 1991); *Geldermann*, 763 F. Supp. at 528-32; *MFS Municipal Income Trust v.*

Under the *pro rata* rule, the plaintiff's potential recovery against remaining defendants is based upon a *pro rata* reduction of damages that may be recovered from the remaining defendants. Thus, if there are four defendants and one settles, the plaintiff's potential recovery against the remaining defendants will be reduced by twenty-five percent. If there are ten defendants and one settles, the liability of remaining defendants will be reduced by one tenth, if two of the ten defendants settle, liability of the remaining defendants will be reduced by one fifth, and so on. See *Jiffy Lube*, 927 F.2d at 160-61 & n.3; *Geldermann*, 763 F. Supp. at 528; *Harris*, *supra* note 5, at 80-85.

Under the proportionate fault rule, defendants who refuse to settle are entitled to a reduction in liability based on the relative fault of the settling defendants – requiring the settling defendant's liability to be determined by a trier of fact even though they are no longer parties to the litigation. See *Jiffy Lube*, 927 F.2d at 160-61 & n.3; *TBG*, 811 F. Supp. at 603-05; *Geldermann*, 763 F. Supp. at 528, 529-30; *Harris*, *supra* note 5, at 98-105.

The issues involved in choosing among these rules are so complex that the authors of the *Restatement (Second) of Torts* refused to endorse a single rule, writing that "[e]ach has its drawbacks and no one is satisfactory." *Restatement (Second) of Torts* §886A, *Caveat & comment m.*

American Medical International, Inc., 751 F. Supp. 279, 281-86 (D. Mass. 1990); *Dalton v. Alston & Bird*, 741 F. Supp. 157, 159-60 (S.D. Ill. 1990); *Terra-Drill*, 726 F. Supp. at 656-57; *In re Atlantic Financial Sec. Litig.*, 718 F. Supp. 1012, 1017-18 (D. Mass. 1988).

The *Restatement* instead invites courts to apply either a *pro tanto* or proportionate fault setoff. See *id.* §885(3) *comment e*. Even the "Uniform Laws" are anything but uniform. The Uniform Contribution Among Tortfeasors Act originally provided for a *pro rata* setoff.¹⁷ Because that rule discouraged partial settlements, the Act was amended and now provides for a *pro tanto* setoff.¹⁸ The Uniform Comparative Fault Act, by contrast, recommends a proportionate fault setoff. See *Uniform Comparative Fault Act* §6, 12 U.L.A. 43, at 57 (Supp. 1993). Federal Courts attempting to adopt a "uniform national rule" have been unable to establish one.¹⁹

It could be argued that the method of offset should not be subject to a rigid universal rule at all. Some courts have found "no compelling reason why a uniform national rule would be necessary."²⁰ Thoughtful

¹⁷ See *Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Forty-Ninth Annual Conference* 244-47 (1939) (§5 & comment).

¹⁸ See *Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Annual Conference Meeting in Its Sixty-Fourth Year* 224 (1955); *Uniform Contribution Tortfeasors Act* §4(a), 12 U.L.A. 57, at 98 (1975).

¹⁹ Compare *Kaypro*, 884 F.2d at 1228-32 (9th Cir. 1989) (establishing uniform national rule of proportional fault setoff) with *Singer v. Olympia Brewing Co.*, 878 F.2d 596, 599-600 (2d Cir. 1989) (establishing "uniform national rule" of *pro tanto* setoff), *cert. denied*, 493 U.S. 1024 (1990).

²⁰ *First Federal Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co.*, 631 F. Supp. 1029, 1036 (S.D.N.Y. 1986); cf. *Jiffy Lube*, 927 F.2d at 161-62 (remanding to district court for choice of setoff instead of adopting a universal rule); *Miller*, 887 F.2d at 906-07 (affirming *pro tanto* contribution bar where district court did not

commentators suggest that different rules should be applied on a case-by-case basis.²¹ The best course may be to leave the matter to the discretion of the settling parties subject to the approval of the district court. Certainly, this is not an appropriate case in which to choose a single rule to govern all future cases.

1. Application Of The Several Contribution Bar Rules Raises Many Complicated Issues

The issues are complex, and the consequences are serious, in the choice among the several contribution-bar rules.

To illustrate the practical effects of the three rules, one may consider the case of a plaintiff who suffered total damages of \$1 million as a consequence of three defendants' joint wrongdoing. If the plaintiff does not settle with any of them, and proceeds through trial to a favorable verdict, it will be able to collect the \$1 million judgment from the defendant of its choice, leaving that defendant to pursue claims for contribution. If the plaintiff settles with an impecunious defendant who lacks insurance and can pay no more than \$100,000, the three contribution bar rules will have radically different effects

consider alternative of proportionate fault bar); *In re NBW Commercial Paper Litigation*, 807 F. Supp. 801, 809-10 (D.D.C. 1992) (suggesting choice of rules may depend on equities of the case).

²¹ See Lewis A. Kornhauser & Richard L. Revesz, *Settlements Under Joint and Several Liability*, (Oct. 6, 1993 Draft; publication forthcoming).

when the plaintiff proceeds to trial and obtains a favorable judgment against the nonsettling defendants.

With a *pro tanto* setoff, defendants who refuse to settle nonetheless obtain the benefit of any partial settlement entered – in the full amount the plaintiff actually receives from the settling defendant. Thus, in our hypothetical, a judgment of \$1 million against the defendants who refused to settle would be reduced by the \$100,000 received in settlement. The nonsettling defendants would pay \$900,000 and the plaintiff – who already received \$100,000 in partial settlement – would be made whole. The overall damages assessed against the joint wrongdoers is the injury they caused – \$1 million – so that the liability imposed reflects the harm caused and joint wrongdoing is appropriately deterred.

Under a *pro rata* reduction rule, however, if the plaintiff settles with one of three defendants the judgment entered against the nonsettling defendants will be reduced *pro rata* – by one third – and the plaintiff will recover only \$666,666.66 from defendants who refused to settle but are found liable at trial. Add to this the \$100,000 received in partial settlement and the plaintiff recovers a total of only \$766,666.66. Thus, a partial settlement under the *pro rata* rule may impose a tremendous penalty, depriving plaintiff of the right to be made whole – thereby discouraging settlement while reducing the deterrent effect of joint and several liability.

This penalty is an arbitrary one – for if the plaintiff had named ten defendants instead of three, the setoff would be only one tenth of the final judgment. The more defendants named, the lesser effect partial settlement with any of them has on the plaintiff's claims. See *supra* at

19. This may create a perverse incentive for plaintiff to name as many defendants as possible in order to reduce the effects of any partial settlements that are entered – encouraging tort victims to name as many marginal defendants as they can in any given case.

The effects of a proportionate fault reduction rule may be even worse. The *pro rata* reduction rule, at least, involves a simple mechanical calculation. The proportionate fault rule requires a finder of fact to calculate the relative culpability not just of the defendants who remain in the case, but of the defendants who settled the claims against them. The jury or other trier of fact is required to make findings regarding the liability of persons who are no longer parties to the litigation. The plaintiff must attempt to persuade the jury not only that the defendants before the jury committed a tort, but that the defendants who settled were not substantially at fault. The remaining defendants who refused to settle are free to point their fingers at an empty chair and to put on a case that shifts the blame from their own shoulders to those of a party who is not even present before the trial court. See *TBG*, 811 F. Supp. at 604; *In re Atlantic Financial Management, Inc. Sec. Litig.*, 718 F. Supp. 1012, 1018 (D. Mass. 1988).

Under the proportionate fault rule, settlement with some defendants does not simplify litigation. It makes litigation more complicated – greatly increasing the burden of the trial court. This is a truly perverse result which undermines the very public policy considerations that favor settlement. Adding to the jury's burden the task "of apportioning fault between absent and present defendants would obviate much of the advantage of partial settlement to the judicial system itself." *Atlantic Financial*, 718 F. Supp. at 1018. "The problems inherent in such a

process are obvious." *TBG*, 811 F. Supp. at 604. The burdens of administering such a system – of "figuring out how much fault belongs with each current and former defendant – are staggering." *Rufolo*, ___ F.2d at ___, 1993 U.S. App. LEXIS 25013, at *13.

When it comes to the rights of the victim of joint wrongdoing, the proportionate fault rule again may be even more deleterious than the *pro rata* rule is. If the settling defendant of limited means in our hypothetical was highly culpable the jury might determine it was fifty percent at fault. The judgment would then be reduced by half and the plaintiff would recover only \$500,000.00 from the nonsettling defendants. Added to the partial settlement of \$100,000, this would mean a total recovery of only \$600,000.00 – that is \$400,000 less than the injury suffered. Of course, if the plaintiff had refused to settle with anyone, it could have collected the entire \$1 million judgment from any defendant – leaving that defendant to deal with any shortfall in contribution from impecunious joint tortfeasors.

Adding to its faults, the result under the proportionate fault reduction rule is unpredictable. Perhaps defendants who refuse to settle will be able to persuade the jury that parties not before the court were even sixty, seventy or eighty percent at fault. "Delaying final determination of the amount of the set-off deprives the plaintiff . . . of one of the chief inducements to settle: certainty." *Atlantic Financial*, 718 F. Supp. at 1018; see *Geldermann*, 763 F. Supp. at 529-30. Defendants armed with the "wild card" jury issue of the proportional fault of joint tortfeasors not present to defend themselves will also be less likely to settle. The only certainties under the proportionate fault rule are (1) that settlement is likely to

greatly complicate trial of the case and (2) that by settling with one of the defendants the plaintiffs forfeit the right to be made whole.

The penalty on settlement is unpredictable, but is likely to be severe. Moreover, because the proportionate fault rule will tend to reduce total recoverable damages, it can only reduce the deterrent effect of joint and several liability. Where victims of joint torts are deprived of the right to be made whole, joint tortfeasors are effectively freed of the deterrent burden of making them whole. Courts that have selected a proportionate fault rule to reduce defendants' liability generally say that they are doing so because it will enhance deterrence.²² The true effect is exactly the opposite. You cannot enhance deterrence by reducing potential (and expected) penalties.

Of the three contribution bar rules, the *pro tanto* setoff may be the most equitable. The settling defendant avoids further liability, thereby encouraging settlement. The plaintiff retains the right to be made whole by recovering a total amount equal to the damages eventually assessed by a jury or other trier of fact. The *pro tanto* rule thus may better serve the public policy that wrongdoing should be deterred and its victims made whole. Defendants who do not settle receive a benefit in the form of a reduction of liability in the amount of the settlement itself.²³ These are matters this Court will want to consider

²² See, e.g., *Kaypro*, 884 F.2d at 1231 ("This approach satisfies the statutory goal of punishing each wrongdoer.").

²³ See *Cannons*, 889 F.2d at 92; *City and County of Denver v. Adolph Coors Co.*, 829 F. Supp. at 345-46; *Dalton*, 741 F.Supp. at 159-60; *Atlantic Financial*, 718 F.Supp. at 1017-18.

in a case where the effect of a settlement and contribution bar on plaintiffs' claims is squarely presented.

Some may worry that the *pro tanto* methodology could be unfair to nonsettling defendants or that it may encourage "collusive" settlement agreements – perhaps requiring a fairness hearing to ensure a partial settlement was entered in good faith.²⁴ However, the danger of "collusion" under a *pro tanto* rule is likely outweighed by the danger of collusion under the competing proportionate fault rule. Under the proportionate fault rule "[t]he nonsettling defendants could collude together against the plaintiff by agreeing to place all the blame on the settling defendants thereby reducing the plaintiff's judgment." *TBG*, 811 F. Supp. at 605; see also *Biben v. Card*, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,512, at 92,332-33 (W.D. Mo. 1991); *MFS Municipal Income Trust v. American Medical International, Inc.*, 751 F. Supp. 279, 284 (D. Mass. 1990).

2. Contribution Bar Rules Which Deny Plaintiffs The Right To Be Made Whole Should Not Be Adopted In This Case

This Court should not, in any event, adopt either the *pro rata* or the proportionate fault rule in this case as a

²⁴ See, e.g. *Miller*, 887 F.2d at 907-08; *TBG*, 811 F. Supp. at 605. A finding that the settlement is reasonable, and entered in good faith may be based on evidence that the amount paid in settlement is reasonable in light of the likelihood of recovery, the solvency of the settling defendant and, perhaps, the relative culpability among the defendants if the plaintiff's claims are proved at trial. See *TBG*, 811 F. Supp. at 605; *Tech-Bilt*, 38 Cal. 3d at 499, 213 Cal. Rptr. at 263.

universal rule to govern future partial settlements. By denying plaintiffs who settle the opportunity to be made whole, the *pro rata* and proportionate fault rules conflict with fundamental principles of tort law and admiralty:

"Nothing is more clear than the right of a plaintiff, having suffered . . . loss, to sue in a common-law action all the wrong-doers, or any one of them at his election; and it is equally clear, that, if he did not contribute to [the injury], he is entitled to judgment in either case for the full amount of his loss."

Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 260 n.7 (1979) (quoting *The "Atlas"*, 93 U.S. 302, 315 (1876)); accord *Hess Oil Virgin Islands Corp. v. UOP, Inc.*, 861 F.2d 1197, 1209-10 (10th Cir. 1988). This principle forecloses any contribution-bar setoff rule that deprives plaintiffs of the right to be made whole. See *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1316-17 (7th Cir. 1992); *Geldermann*, 763 F. Supp. at 529-30.

In *Edmonds* a longshoreman injured in an accident aboard a vessel sued the shipowner, but not his own employer – a stevedore contractor – who was immune to suit under a workers' compensation system that forbade suits by longshoremen against their employers and barred shipowners' claims for contribution from stevedores. *Edmonds*, 443 U.S. at 258. A jury found that the vessel was only 20% at fault, while the stevedore contractor was 70% at fault and the longshoreman plaintiff was 10% at fault. *Id.* Noting that claims for contribution were barred by statute – as if the stevedore contractor had been a settling defendant – the court of appeals reduced the longshoreman's award against the shipowner to the portion of the loss attributable to the

vessel's fault. See *Edmonds v. Compagnie Generale Transatlantique*, 577 F.2d 1153, 1155-56 (4th Cir. 1978) (en banc), *rev'd*, 443 U.S. 256, 268-73 (1979). This Court reversed, holding that a proportionate fault claim reduction was inappropriate because it both complicates litigation and reduces injured persons' recoveries. *Edmonds*, 443 U.S. at 268-73. The Court acknowledged the relative inequity – between joint tortfeasors – of requiring a person only 20% at fault to pay 90% of the damages, but it also observed that the disparity in what joint tortfeasors are required to pay has been tolerated since the creation of joint and several liability. *Id.* at 272.

The Court concluded that the principle of contribution among joint tortfeasors could not be applied to limit their victim's recovery:

Contribution remedies the unjust enrichment of the concurrent tortfeasor [not called on to pay] and while it may sometimes limit the ultimate loss of the tortfeasor chosen by the plaintiff, it does not justify allocating more of the loss to the innocent employee, who was not unjustly enriched.

Edmonds, 443 U.S. at 272 n.30 (citation omitted).

The *pro rata* and proportionate fault setoff rules make sense only if the right to contribution among joint tortfeasors does "justify allocating more of the loss to the innocent" victim of a tort – but *Edmonds* indicates that it does not. See *Edmonds*, 443 U.S. at 272 n.30; see also *Oil Spill by the Amoco Cadiz*, 954 F.2d at 1316-17; *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1545-48 (11th Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988).

Because the right to contribution is derivative and equitable in character, it should not be applied in a fashion that prejudices the ability of victims of joint wrongdoing to be

made whole. "[T]he plaintiff should not be penalized for settling." *Hess Oil*, 861 F.2d at 1209.

IV. CONCLUSION

For the foregoing reasons the judgment of the Eleventh Circuit should be reversed. This Court should hold that claims for contribution may be barred in connection with the partial settlement of a case. It should not reach the question of what effect a partial settlement and contribution bar may have on the plaintiffs' claims. However, if it reaches this issue it should not adopt a "proportionate fault" or "*pro rata*" setoff as a universal contribution-bar rule.

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